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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 266

W. T. HAGANS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 348-354) is reported at 315 F. 2d 67.

JURISDICTION

The judgment of the court of appeals was entered on March 21, 1963. A petition for rehearing was denied on May 22, 1963. Mr. Justice Black extended the time for filing a petition for a writ of certiorari

to and including July 11, 1963. The petition was filed on July 11, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's arrest and the subsequent search were justified upon the basis of probable cause.

2. Whether the search of petitioner's garage and automobiles and the seizure therefrom of 206 gallons of nontax-paid whisky were reasonable.

3. Whether the record shows entrapment of petitioner as a matter of law.

STATEMENT

Petitioner was convicted on April 25, 1962, after trial by jury in the United States District Court for the Middle District of Georgia, on seven counts of a ten count indictment charging him with the possession, transportation and selling of nontax-paid whisky, in violation of 26 U.S.C. 5205(a)(2) and 5604(a), and was sentenced to imprisonment for four years on each count, the sentences to run concurrently. He asserts as error the denial of his pretrial motion to suppress as evidence the 206 gallons of nontax-paid

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[1] Counts one, two and three charged, respectively, possession, transportation and sale on March 1, 1961; counts four, five and six, possession, transportation and sale on March 5, 1961; counts seven, eight and nine, possession, transportation and sale on March 8, 1961; and count ten, possession on April 25, 1961. A co-defendant, J. B. Smith, pleaded guilty.

whisky seized incident to his arrest, and the denial of his motion for judgment of acquittal on the basis of entrapment.

1. *Motion to Suppress*

On March 1, 1961, Melvin Daniels, an informer whom the Macon, Georgia, office of the Alcohol and Tobacco Tax Division, United States Treasury Department, had found to be reliable (R. 61, 69), delivered to Special Investigators William W. Williams and George D. Ferguson of that office 25 gallons of nontax-paid whisky which he stated he had purchased from petitioner (R. 61), who was considered a major violator (R. 31), who had been convicted four times for this offense (R. 305). Thereafter, Criminal Investigator Thomas D. Anderson of the Atlanta office was assigned to work with Daniels in an undercover capacity (R. 70). On March 4, Daniels introduced him to petitioner as "Andy Thomas" (R. 236), purporting to be in the whisky business (R. 238). After some discussion as to price, it was agreed that Daniels and Anderson would pick up a quantity of whisky from petitioner the following night at his residence (R. 91, 221). Anderson saw Daniels hand petitioner the money for the whisky obtained on March 1 (R. 243).

On March 5, at about 9:00 p.m., Anderson and Daniels went to petitioner's house, were met by petitioner and J. B. Smith, and, after paying petitioner $120, received 24 gallons of nontax-paid whisky. Smith helped load the whisky which was stored in a 1946 Plymouth in petitioner's garage. Petitioner

told them that he would have plenty of whisky the following Wednesday night, and would let them have it on credit if they did not have enough money (R. 92-93).

On Wednesday, March 8, at 10:30 p.m., Anderson and Daniels again went to petitioner's house, where they purchased 66 gallons for $330, paying $60 on account. Smith took their automobile to get the whisky (R. 95). Petitioner told them that it was not on hand because the prior payment with $20 bills had made him afraid of them (R. 223). Anderson paid petitioner the $270 balance on March 9 (R. 97).

On April 24, Daniels, in the presence of Special Investigator Williams, called petitioner from the Alcohol and Tobacco Tax office and placed an order for more whisky (R. 177). Petitioner told him not to come for it until 10:00 or 10:30 that night (R. 188, 252). A warrant for the arrest of petitioner and Smith was then obtained, based upon a complaint by Investigator Ferguson which stated:

> On March 1, 1961, Melvin Daniels purchased 25 gallons of nontaxpaid whiskey from W. T. Hagans and J. B. Smith in Upson County, Georgia, and delivered this nontaxpaid whiskey to Investigator Williams and me in Bibb County, Georgia.[2]

It was then arranged to arrest petitioner and Smith when Anderson picked up the whisky.

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[2] The arrest warrant was offered in evidence as exhibit G.1 (R. 35-36), and is set forth in the opinion of the court of appeals, 315 F. 2d at 69 n. 1 (R. 351-352).

Seven officers took part in the arrest (R. 18). They were all briefed on the previous transactions and the pending transaction between Daniels, Anderson, petitioner and Smith (R. 98, 115, 117, 118, 125, 182). Since the raid was one of a number of arrests made that night (R. 26), the officers did not arrive at petitioner's house until about 1:30 a.m. on April 25 (R. 71). The original plan for arresting petitioner was for the other officers to surround the house and effectuate the arrest after petitioner delivered the illicit whisky to Anderson, but because of dogs in the neighborhood it was not possible to get close enough to the house (R. 27-29, 105-106). Instead, Investigators Williams and Brooke L. Richards got into the automobile that Anderson was driving, and the other officers followed in another vehicle (R. 43, 71, 106). The arrest warrant, or a copy, was in the vehicle that Anderson was driving (R. 18, 35).[1] When Anderson drove up to the house, he called to petitioner who came out on the back porch and down the back steps. Then, seeing the lights of the second automobile approaching, petitioner told Anderson to put out his lights. At that point, at 1:35 a.m., Richards got out of the automobile and placed petitioner under arrest (R. 8, 72, 107). Then Williams, having reason to believe that Smith would be inside the house (because he had been informed by Anderson of Smith's presence and participation in the prior trans-

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[1] The officers also had daytime search warrants for three automobiles (R. 36) upon which the officers did not rely (R. 37) and which they returned unexecuted (R. 40).

actions), walked into the house, found Smith sitting on the couch in the living room, and arrested him (R. 8, 33, 108). The arrests in both instances were based both upon the warrant and upon the fact that petitioner and Smith had committed felonies, *i.e.*, violations of the Revenue Laws, in the presence of Investigator Anderson on March 5 and March 8 (R. 180).[4]

After the arrests were effectuated, the officers searched the Plymouth which was parked in the back-yard ten or fifteen feet from the back steps where petitioner had been arrested (R. 34). This was the vehicle from which Anderson had unloaded illicit whisky during one of the previous transactions (R. 78). They found 20 gallons of nontax-paid whisky inside (R. 9, 107). They also entered the garage, which was 65 feet from the house (R. 195), and searched a 1951 Ford in which they found an additional 186 gallons (R. 9, 107). Additionally, a rear room in the garage was searched to determine if any whisky was there (R. 85-86), but none was found.

The district court made no finding as to the validity of the arrest warrant, stating only that it presented an "interesting question." It ruled that the arresting officer had probable cause for the arrest and "a reasonable search of the premises as an incident

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[4] Government counsel announced at the start of the hearing on the motion to suppress that the government would seek to support the arrest and resultant search both on the basis that the warrant was valid and on the basis of probable cause (R. 22). Reliance on the search warrants, however, was specifically disclaimed (R. 215).

to that lawful arrest." The court concluded "that the search and seizure were not invalid, were not too extensive, and were reasonable under the circumstances" (R. 218).

2. *Entrapment*

In support of his claim of entrapment, petitioner, who testified on direct to prior convictions, stated that upon his release from his last incarceration in November 1960 he determined for reasons of health and consideration for his family that he would not enter the business again (R. 305-307). He claimed that he was not in the business when Daniels first communicated with him, and that Daniels had begged him to obtain whisky, saying his wife was in the hospital and he was out of a job and broke. Since Daniels was a friend for whom he had furnished whisky in the past, he obliged (R. 310-311). He said he made no profit on the transaction, selling the whisky for his cost of $4.00 a gallon. He contended that Daniels talked to him for an hour and a half, kept after him, and caught him "off balance" (R. 309). Petitioner's wife also said that Daniels gave her the same sympathy-evoking reason for wanting petitioner to furnish him whisky (R. 289).

The government's evidence presented a different story. Daniels, who had in the past hauled illicit whisky for a man in the business but had not himself been an entrepreneur (R. 254, 264), and who admitted he was paid $10 a day by the government while working on the case and given a $250 reward upon its successful completion (R. 253), stated that

it was petitioner and not he who had made the initial contact and proposed doing business (R. 252). He specifically denied either playing upon petitioner's sympathy or being told by petitioner that the latter was no longer in the business (R. 280). Both Daniels and Anderson testified that petitioner told them that if they all stuck together, were slick and played it smooth, they could make a lot of money (R. 224, 248). Anderson added that immediately after the introduction, petitioner asked if they could come to his house that night and pick up a load of whisky from him (R. 235-236). Petitioner, in his initial conversation with Anderson, at first asked $7.00 a gallon, and, when Anderson balked at the price, went down to $5.00 if Anderson and Daniels would do the hauling (R. 221). The March 5 and March 8 purchases were at the rate of $5.00 a gallon (R. 221-223).

The court, in its instructions to the jury, stated that the gist of entrapment is the conception of the crime by a government agent for the purpose of prosecuting a defendant who had no previous intention to commit it (R. 332), and that the key question "is not one of laying a trap or of trickiness or deceit, but one of seduction or improper inducement to commit crime" (R. 334-335). The court specifically instructed that a suspect may not be tested by being put under extraordinary temptation or inducement, as for example by an appeal to his humanity or by the offer of a fabulous price, and that a person acting for the government could not organize a plot to break the law and then prosecute for it (R. 334). The court in-

structed that the evidence of petitioner's prior convictions could properly be considered "for whatever bearing the jury may think and find it has, if any, upon this question of entrapment" (R. 335).

ARGUMENT

1. As the courts below held, there was probable cause for petitioner's arrest independent of the warrant of arrest. Section 7608(2)(3) of Title 26, U.S.C., gives to an agent charged with enforcing the alcohol tax provisions of the Internal Revenue Code the right to make arrests without warrant "for any felony cognizable under the laws of the United States if he has reasonable grounds to believe that the person to be arrested has committed, or is committing, such felony." An arrest may be justified on this statutory authority even though the agents also had a warrant which proved to be invalid. *United States* v. *Rabinowitz*, 339 U.S. 56, 60; *Go-Bart Co.* v. *United States*, 282 U.S. 344, 356; *Stallings* v. *Splain*, 253 U.S. 339, 342. The facts set forth in the Statement show that the agents had good reason to believe that petitioner was in the illegal liquor business and had committed a felony.

The hour of arrest furnishes no basis for complaint in this case since petitioner himself had told the agents to come after 10 p.m. The time was fixed

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Giordenello v. *United States*, 357 U.S. 480, is not to the contrary. There the probable cause argument was advanced for the first time in this Court, and the Court refused to hear it because it had not been raised below. See 357 U.S. at 488.

to coincide with a proposed illegal business transaction. There was thus every reason to believe (as turned out to be the fact) that although the hour was late, the defendants would be awake and ready to do business.[5] Nor can it be said that the officers had stale information. In addition to knowledge of the prior consummated sales, they knew of the arrangements to purchase whiskey that very night. The officers were not required to act after the first sale. As this Court observed in *United States* v. *Rabinowitz*, 339 U.S. 56, 65, "[s]ome flexibility will be accorded law officers" in the exercise of their judgment "as to when to close the trap."

While, therefore, there is no need to rely upon the warrant of arrest, we believe that the warrant meets the requirements of Rules 3 and 4 of the Federal Rules of Criminal Procedure, as interpreted by this Court in *Giordenello* v. *United States*, 357 U.S. 480. The complaint set forth on its face all of the elements of a violation of 26 U.S.C. 5205(a)(2) and

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[5] Petitioner suggests that *Jones* v. *United States*, 357 U.S. 493, 499-500, has left open the question whether a "forceful nighttime entry into a dwelling to arrest a person reasonably believed within" can constitutionally be made when the arrest is based upon probable cause rather than upon a warrant. The simple answer here is that petitioner was arrested outside of his house, so that there was no entry, forceful or otherwise. Nor was there even a trespass, since the arresting officer accompanied Investigator Anderson, who was invited and expected. To be sure, Smith was arrested inside the house, but that arrest was not the basis for the search; no force was used to enter the house (the door was open, R. 25), and the officers had the right to enter the house to arrest another violator.

5604(a): to wit: (1) the sale (2) by petitioner (3) of nontax-paid whiskey. That the whiskey was nontax-paid appeared clearly as the personal knowledge of the complainant, since he stated that it was delivered to him by the purchaser. The naming of the purchaser showed that the whiskey was in fact sold, that the seller was petitioner, and that the purchaser was the source for the affiant's belief that a sale of the whiskey had been made by petitioner. The fact that the information relied upon was technically hearsay would not render the warrant invalid. *Jones* v. *United States*, 362 U.S. 257. The complaint named the informant and showed corroboration by the delivery of the whiskey. It therefore set forth sufficient facts to enable the commissioner to conclude that there was "substantial basis" to believe that the sale had "probably" taken place. See *Jones* v. *United States*, 362 U. S. at 271.

2. Since petitioner's arrest was lawful, it was lawful to search "the premises under his immediate control." *Harris* v. *United States*, 331 U.S. 145, 151. This included his house and his entire curtilage. *Williams* v. *United States*, 273 F. 2d 781, 795 (C.A. 9), certiorari denied, 362 U.S. 951; *Kelley* v. *United States*, 61 F. 2d 843 (C.A. 8); *Bartlett* v. *United States*, 232 F. 2d 135 (C.A. 5); *Crawford* v. *United States*, 160 F. 2d 629 (C.A. 4); accord *Townsend* v. *United States*, 271 F. 2d 445 (C.A. 4), certiorari denied 362 U.S. 921. The only limitation is that the search not go "beyond that which the situation reasonably demanded." *Harris* v. *United States*, *supra*, at 152-153.

The search here was for the limited purpose of finding whiskey (which was supposed to be delivered that night) and was limited in scope to the garage, the automobile therein, and the automobile in the yard. The house was entered only to find Smith and was not searched. The search of those areas was reasonable. Since petitioner had told Daniels not to come until 10:00 or 10:30 p.m. (R. 188, 252), it was reasonable to assume that the late hour was to enable petitioner to bring the whiskey to his house, and hence that he would have it in his possession at that time.[1] It was therefore natural to assume that the whiskey would still be in the vehicles in which it had been transported or in the garage. Moreover, one of the vehicles searched was that from which Anderson had himself unloaded whiskey during a previous transaction. The search was properly confined to an area outside the house where the contraband would likely be found.

3. The question of entrapment was one for the jury under proper instructions. *Sorrells* v. *United States*,

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[1] The fact that on March 8 petitioner did not have the whiskey on hand, but sent Smith for it, meant only that the officers were not certain that the whiskey would be at the house when the arrests were effectuated. Since the whiskey had been at the house on March 1 and March 5, they had reason to believe that it would be there again on the night of the arrest. Moreover, the reason for the variance in procedure on March 8 was that petitioner at that time was suspicious of Anderson (R. 223). Since petitioner was willing to deal with Anderson and Daniels on the arrest night, the officers had reasonable grounds to believe that he had abandoned his suspicions and that the whiskey would be at the house when they arrived.

287 U.S. 435; *Sherman* v. *United States*, 356 U.S. 369; *Masciale* v. *United States*, 356 U.S. 386. Here, petitioner supported his contention primarily by his own and his wife's self-serving testimony, with the single additional allegation that he made no profit on his initial sale to Daniels. The evidence to the contrary was overwhelming. There was the testimony of Daniels that petitioner made the initial contact; the fact that, even by his own reckoning, he made (or stood to make on the April 24 transaction) a profit on all subsequent transactions and initially asked a price of Anderson that would have given him an even greater profit; the testimony that immediately upon meeting Anderson he asked if the latter could come to his house that night to pick up a load of whisky; the testimony that he talked of the money they could all make if they worked together; and the fact that the quantity of whisky seized at his arrest was almost twice the total that he had sold to Daniels and Anderson in the three prior transactions.* This was clearly sufficient evidence to go to the jury.

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*When questioned on cross-examination concerning the 206 gallons found in his possession when he was arrested, petitioner would only say: "Well, that was—I'm very easily led. I can be led into anything, and somebody just keeps pounding and pounding on me, I'll go ahead and do it for them" (R. 311).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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